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The State of Utah v. The Honorable Henry Ruggeri, District Judge : Brief of the Utah State Bar Association Submitted By The Criminal Law Section As Amicae, Curiae

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

- vs. -

[illegible] RUGGERI, JUDGE,

Defendant.

BRIEF OF THE UTAH STATE BAR [illegible]
SUBMITTED BY THE CRIMINAL LAW
AS AMICAE CURIAE

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INDEX

CASES CITED

TEXTS

CONSTITUTIONS

STATUTES

IN THE SUPREME COURT

of the

STATE OF UTAH

STATE OF UTAH,
Plaintiff,

- vs. -

HENRY RUGGERI, JUDGE,
Defendant.

Case No. 10730

BRIEF OF THE UTAH STATE BAR ASSOCIATION SUBMITTED BY THE CRIMINAL LAW SECTION AS AMICAE CURIAE

STATEMENT OF KIND OF CASE

This is a brief in amicus curiae filed at the request of this Honorable Court by the Criminal Law Section of the Utah State Bar Association to try to assist this

Court in an impartial manner in considering the petition for extra-ordinary relief filed by the District Attorney of the Third Judicial District in the State of Utah, seeking review of an Order by the Honorable Henry Ruggeri, District Judge, suppressing testimony given by C. W. "Buck" Brady, Jr. before the Salt Lake County Grand Jury.

STATEMENT OF FACTS

The facts as set forth in plaintiff's brief and as amplified in the brief of defendant sufficiently set forth the circumstances of this case. C. W. "Buck" Brady, Jr., the Public Safety Commissioner of Utah, was indicted by a Salt Lake County grand jury in December of 1965 (R. 61). The indictment charged Brady with Perjury in the first degree, allegedly committed while testifying before that same grand jury on August 16, 1965. At the time of his appearance before the grand jury, Brady indicated that he would like counsel. He was informed that the Statutes of Utah forbid the presence of counsel in the grand jury room (R. 28). Brady then indicated that he wished to testify as a voluntary witness, even **without the aid of counsel (R. 29).**

After the indictment was returned, Brady filed several pleas in abatement and eventually moved to suppress the allegedly perjurious testimony on the grounds that he had been denied his rights under Article I, Section 12, of the Utah Constitution and Amendments V and VI of the Constitution of the United States. On May 11,

1966, the Honorable Henry Ruggeri, defendant in this matter, entered on Order suppressing the testimony of Brady as set forth in the indictment (R. 53-54). From the foregoing Order the instant proceeding issued, seeking a review of the rule.

POINT I

MAY THIS COURT REVIEW, BY AN EXTRAORDINARY WRIT, THE GRANTING OF A MOTION TO SUPPRESS EVIDENCE AS A FORM OF INTERMEDIATE REVIEW IN A CRIMINAL CASE.

From the earliest of cases in the State of Utah this court has set down guide lines which have remained unchanged and unmodified. In *People v. Van Tassel,* 13 Utah 9, 43 P. 625, wherein this court stated at page 11:

> "This effect of a writ of mandamus is to compell the performance of an act which the law specically enjoins, and not to undo an act already done." (Citing *Maxwell v. Burton,* 2 Utah 595)

In *State v. Booth,* 21 Utah 88, 59 P. 553, our court reiterated the above rule and further at page 94, noted that mandamus did not lie *where there is another speedy or adequate remedy.*

Generally speaking, mandamus has been used in such cases as *State Ex Rel v. Morehouse, et al,* 38 Utah 234, 112 P. 169, to compell a public officer to perform an act when a public officer has a duty to act and discretion does not exist, i.e., the right of a litigant to have his case set for trial. (See also *Harris v. Turner, Judge,* 96

Utah 342, 85 P.2d 824.) A similar test of whether or not review by this court by means of certiorari is available is discussed in *Olson v. District Court of Salt Lake, et al,* 93 Utah 145, 71 P.2d 529, wherein this court in citing from *Ferris, Extra-Ordinary Legal Remedies,* Section 157, Page 178, stated that certiorari would lie

> ". . . where no appeal or other adequate remedy is available, and is appropriate in all such cases where the substantial rights of an applicant have been so far invaded as to prejudicially effect him if the proceeding or judgment remains unreversed."

In addition this court stated in *Rohwer v. District Court,* 41 Utah 279, 125 P. 671, that the granting or denying of writs of certiorari are within the reasonable discretion of this court and further went on to state

> "It does appear that even though an absolute lack or excess of jurisdiction (by the lower court) cannot be shown, a writ can, and in practice, is issued in the sound discretion of the higher court."

Rule 65 (B) of the Utah Rules of Civil Procedure abolished the formal titles to the various common law writs herein referred to and merely established the criteria that extraordinary relief may be applied for

> "Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these rules. . . ."

Illustrative of such a procedure for intermediate review

by this court is *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186, wherein this court felt compelled to review the propriety of a District Court Judge's ruling prior to the actual commencement of a trial on the merits. It would therefore appear that under extraordinary circumstances under the general guide lines espounded by this court from its very inception that upon showing of unusual circumstances and in the sound discretion of this court, review of an intermediate nature is available to a party.

POINT II

C. W. "BUCK" BRADY, IN CRIMINAL NO. 19531, AS FILED IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, DID NOT ACQUIESE TO FURTHER INTERROGATION OUTSIDE OF THE PRESENCE OF COUNSEL IN THE EVENT HE WAS ENTITLED TO SAME.

This point is raised merely as a preface to the principal issue before this Court as it does not appear to be impartially discussed in either of the advocates' briefs. We believe the prime question for this court to decide is raised in our Point III herein, that being the right of Brady to have counsel accompany him when he was compelled to be a witness before the Salt Lake County Grand Jury which was investigating aspects of his activities during his tenure as a Salt Lake County Commissioner.

In *Miranda v. Arizona*, 16 LE2d 694, at 707, the United States Supreme Court laid down a very controversial rule of law which emphatically applies not only

to police officers but to prosecuting attorneys wherein the court stated:

> "If, however, he indicates in *any* manner and at *any* stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Emphasis ours.

Acknowledging under a different fact situation this court in *State v. Hamilton,* 18 Utah 2d, 419 P.2d 770, decided appellant's rights to counsel had adequately been protected, based upon the record before this court we believe it fair to conclude that Brady requested counsel and based upon the statutes of this State the District Attorney advised him that he was not entitled to have counsel accompany him into the Grand Jury Room while he was a witness. We, therefore, believe from a fair evaluation of the record in light of *Miranda v. Arizona,* supra, that the principal question for this court to determine is that one discussed next in this brief.

POINT III

ADMISSIBILITY OF BRADY'S TESTIMONY GIVEN BEFORE THE GRAND JURY IN THE ABSENCE OF COUNSEL.

Historically, both the Constitution of the United States and the Constitution of Utah call for the existence of the grand jury. U. S. Const. amend. V; Utah Const. art. I, §13; See *United States v. Hill,* 26 Fed. Cas. 315, 316 (No. 15,364) (C.C.D. Va. 1809); *Hurtado v. People of State of California,* 110 U.S. 516, 534 (1884); *Crowley v. United States,* 194 U.S. 461, 475 (1904). This insti

tution was, of course, borrowed from our English traditions and is vested with substantially the same powers and duties as its historical prototype. See *Blair v. United States,* 250 U.S. 273 (1919).

The grand jury serves two purposes. One is to indict persons accused of crime upon just grounds that might be brought to trial. This is its inquisitorial function which still survves under the Constitution of Utah. The other tradtional function of the grand jury is to protect against unfounded prosecution by providing a disinterested determination of probable guilt. This right is set forth in the Fifth Amendment insuring that all accused will be charged only upon the concurrence of a body of his peers — the grand jury. See Orfield, *The Federal Grand Jury,* 22 F.R.D. 343, 394 (1959).

The origin of the grand jury is somewhat obscure. It antedates the development of trial by jury and has its roots in the Anglo-Saxon system of frank-pledge whereby the inhabitants of the realm were sureties to the king for the good behavior of each other. See *1 Blackstone, Commentaries* 114 (Lewis' ed.); 4 *Blackstone,* Commentaries 273 (Lewis' ed). During the reign of Ethelred II (A.D. 978-1016), accusing bodies of twelve thanes existed for every hundred. These bodies were confirmed statutorily after the conquest by the Azzize of Clarendon (A.D. 1166) and later in the Statute of Northhampton (A.D. 1176). See Edwards, *The Grand Jury* 7 (1906). In 1368 during the 42nd year of the reign

of Edward III, *le graunde inquest* was created. This body consisted of a panel of twenty-four knights having jurisdiction over the entire country. Like the accusing inquests of the hundreds, it was still necessary to have twelve members concur. See Edwards, *The Grand Jury* 2 (1906). *Le graunde inquest* marks the real beginnings of the grand jury as we know it today.

In the beginning the grand jury was probably designed to secure the ends of the Crown. It was not until 1681, during the reign of Charles II, that the grand jury arose in defense of personal liberties and assumed its "second function" as protector of the individual from the arbitrary power of the government. By virtue of two cases in that year, the grand jury laid basis to its right to hear evidence in private, apart from the court and free from the influence of the prosecutor. The case of *Steven College* and the *Earl of Shaftesbury* case have since been proclaimed as the two most celebrated instances of fearless action by the grand jury in defense of liberty. See Edwards, *The Grand Jury* 28 (1906). They have also been cited as the only evidence of such action. See Antell, *The Modern Grand Jury: Benighted Supergovernment,* 51 A.B.A.J. 153, 155 (Feb. 1965) (suggests that these juries were insurrectionary and probably not true to their oaths).

Both Glanville and Bracton wrote of the accusatory inquests; however, the first indication that the proceedings were to be kept secret is found in Bracton's *de legibus.* See Glanville (*Beames Translation—Legal Clas-*

sic Series) 278, 194; Bracton, *de legibus* (*Sir Travers Twiss ed.*) 243; Edwards, *The Grand Jury* 9-25 (1906). During Bracton's time the secrecy was not complete, however, since the judges were free to inquire as to each member of the inquest as to the causes which induced its action. As the right to trial by jury became established, the inquest no longer determined guilt or innocence and it was no longer necessary for the justices to inquire of the members as to their reasons. The *Steven College* and *Shaftesbury* cases also helped to establish the secrecy of the grand jury proceedings and its prerogative to act according to the dictates of its conscience.

Whatever the initial reasons for the secrecy requirement, this characteristic has remained with the grand jury to the present time. It has been praised as source of the grand jury's independent power, see Edwards, *The Grand Jury* 27 (1906); Wickersham, *The Grand Jury: Weapon Against Crime and Corruption,* 51 A.B.A.J. 1157 (1965), and it has been the central theme of most criticism of the grand jury. See Antell, *The Modern Grand Jury: Benighted Supergovernment,* 51 A.B.A.J. 153 (1965).

There can be little question but that Utah Code Ann. §77-19-10 (1953) is the echo of the secrecy requirement which was imposed during Bracton's time. Recent opinions of this Court indicate a keen awareness of the reasons justifying such a provision. See *State v. Faux,* 9 Utah 2d 350, 345 P. 2d 186 (1959) (Henroid and Callister, JJ., dissenting).

One aspect of the secrecy rule has concerned itself with defining those parties who may be present during sessions of the grand jury. Utah Code Ann. §77-19-9 (1953) enumerates those persons and the circumstances under which they may be present. *Meyers v. Second Judicial Dist. Court,* 108 Utah 32, 156 P. 2d 711 (1945) interpreted this section narrowly and suggested that the presence of an unauthorized person would invalidate an indictment regardless of prejudice to the defendant.

The question as to who may be present before a grand jury occupied the attention of the federal courts for almost a century. See Orfield, *The Federal Grand Jury,* 22 F.R.D. 343 (1959). The present federal position is contained in Rule 6(d) of the Federal Rules of Criminal Procedure promulgated by the Supreme Court. The conflicting federal decisions which antedate the Rules of Criminal Procedure were written primarily at the insistence of defendants moving to quash indictments because of the presence of some deputy marshal or other unauthorized person in the grand jury room. Tending to lean in favor of the defendant and in support of the secrecy requirement, the courts continually restricted the the number of authorized persons. The theory and thrust of these decisions concerned the right of a defendant not to have an unauthorized person present and the right of the grand jury to conduct its proceeding in secret. See *United States v. Reed,* 27 Fed. Cas. 727, 734 (No. 16,134) (C.C.D. N.Y 1852) (intimates the mere presence of an unauthorized person is not fatal); *United*

States v. Terry, 39 Fed. 355, 361 (N.D. Cal. 1889); presence of porter or servant not fatal); *United States v. Edgerton*, 80 Fed. 374, 375 (D. Mont. 1897) (indictment should be quashed where expert witness remained in jury room); *United States v. Heinze*, 177 Fed. 770, 772 (S.D. N.Y. 1910) (accountant may not be present to aid prosecutor — injury to defendant is immaterial); but see *United States v. Wells*, 163 Fed. 313, 327 (D. Ill. 1908) (presence of United States attorney during deliberation was not necessarily fatal); *United States v. Terry*, 39 Fed. 355, 356 (N.D. Cal. 1889) (United States attorney's presence during opinions and voting is merely an irregularity).

It is interesting to note that until Congressional action in 1906 neither the Attorney General, the Solicitor General, nor any officer of the Department of Justice could properly appear before a federal grand jury. 34 Stat. 816. See *United States v. Rosenthal*, 121 Fed. 862, 873 (S.D. N.Y. 1903) (harm to the defendant need not be shown); *United States v. Virginia-Carolina Chemical Co.*, 163 Fed. 66, 73 (1908).

Whether or not a stenographer could be present before a federal grand jury was also the subject of many conflicting opinions until a statute in 1933 provided for their presence. 18 U.S.C. §556, 48 Stat. 58. See *United States v. Goldman*, 28 F.2d 424, 426 (D. Conn. 1928) stenographer was also a lawyer appointed as assistant United States attorney — indictment not valid); *Latham v. United States*, 226 Fed. 420, 423 (5th Cir. 1915) (clerk

in office of United States attorney could not take stenographic notes); but see *Wilson v. United States,* 229 Fed. 344, 347 (2nd Cir. 1916) (stenographer connected with United States attorney's office allowed to be present). See also *Wilkes v. United States,* 291 Fed. 988, 991 (6th Cir. 1923), *cert. denied,* 263 U.S. 719; *Hale v. United States,* 25 F.2d 430, 434 (8th Cir. 1928) (the 6th and 8th Circuits permitted stenographers though not connected with office of United States attorney). In view of the litigation which has taken place and the statutes which have been enacted, one can say with some certainty that the statutes setting forth those who may properly be present before a grand jury are to be construed narrowly.

Utah Code Ann. §77-19-9 (1953) concludes as follows: "No person other than as in this section prescribed shall be permitted to be present during the sessions of the grand jury; . . ." This statute clearly indicates the intent of the legislature to prohibit any other persons, including attorneys for witnesses summoned to appear, from attending.

Both the state and federal Constitutions protect an individual from self-incrimination. Both guarantee him the right to be represented by counsel in a criminal prosecution. These rights have often been discussed in connection with a witness compelled to appear before a grand jury. The opinions have made it clear that the grand jury is not a court, contrary to the finding of defendant in this case (R. 88). With the development

of petty juries after the Norman conquest and the establishment of right to trial by jury, the grand jury has ceased to determine guilt or innocence. It is merely an accusatory body. If the grand jury sought to weigh evidence on both sides, it would in fact usurp the powers of the court and the petty jury.

But for Utah Code Ann. §77-20-3 (1953) there would be no obligation to inform the accused of the witness who appeared against him. See *Wilson v. United States,* 221 U.S. 361, 375 (1911). The constitutional right to confrontation does not include the right to confront witnesses before the grand jury. *Boehm v. United States,* 123 F.2d 791, 806 (8th Cir. 1941). The right to a public trial does not apply to grand jury proceedings. *United States v. Central Supply Ass'n.,* 34 F. Supp. 241, 244 (N.D. Ohio 1940).

Utah Code Ann. §77-19-4 (1953) provides that the grand jury shall not be bound to hear evidence for the defendant. This is consistent with the rule in the federal courts. *United States v. Blodgett,* 30 Fed. Cas. 1157 (No. 18,312) (S.D. Ga. 1867); see *In re Charge to Grand Jury,* 30 Fed. Cas. 998 (No. 18,257) (D. Md. 1836) (Chief Justice Taney). (Defendant has no right to appear in person or by counsel. *United States v. Palmer,* 27 Fed. Cas. 410 (No. 15,989) (D.C. Cir. 1810); *United States v. Ambrose,* 3 Fed. 283, 287 (S.D. Ohio 1880); *United States v. Kilpatrick,* 16 Fed. 765, 769 (W.D. N.C. 1883).

A witness appearing before the grand jury is pro-

tected by his constitutional right against self-incrimination. *Brown v. Walker,* 161 U.S. 591 (1896); *Counselman v. Hitchcock,* 142 U.S. 547, 552 (1892). The federal courts have held on many occasions, however, that there is no obligation to warn a witness or advise a witness concerning his constitutional right. *United States v. Charles,* 25 Fed. Cas. 409 (No. 14,786) (D.C. Cir. 1813); *United States v. Wetmore,* 218 Fed. 227, 233 (W.D. Pa. 1914). The courts have further held that a witness is not entitled to the aid of counsel while he is testifying before the grand jury. *In re Black,* 47 F.2d 542, 543 (2nd Cir. 1931); *In re Shaw,* 172 Fed. 520, 521 (S.D. N.Y. 1909) (witness should have right to counsel after subpoena and before testifying); see also *United States v. Winter,* 348 F.2d 204 (2nd Cir. 1965), *cer. den.* 382 U.S. 955.

The federal courts have been troubled, however, by the distinction between a *defendant* and a mere *witness* and have generally required that a defendant be advised of his rights against self-incrimination. See *United States v. Scully,* 119 F. Supp. 225, 227 (S.D. N.Y. 1954), *aff'd* 225 F.2d 113, 116 (2d Cir. 1955), *cert. den.* 350 U.S. 897 (1956); *Pulford v. United States,* 155 F.2d 944, 947 (6th Cir. 1946); *United States v. Lawn,* 115 F. Supp. 674, 677 (S.D. N.Y. 1953); but see *United States v. Parker,* 244 F.2d 943, 947 (7th Cir. 1957) (one earmarked by grand jury for investigation should be warned); *Stanley v. United States,* 245 F.2d 427, 434 (6th Cir. 1957) (one in custody should be warned). A witness ordinarily may not claim protection as a defendant, however, unless

there has been an indictment returned, or information filed, or at least a complaint filed before a magistrate. See *United States v. Kimball,* 117 Fed. 156 (S.D. N.Y. 1902); *Maffie v. United States,* 209 F.2d 225, 231 (1st Cir. 1954); *Daly v. United States,* 209 F.2d 232 (1st Cir. 1954). However, in *United States v. Edgerton,* 80 Fed. 374 (D. Mont. 1897), the court stated that an indictment should be quashed when it appears that the defendant was compelled by subpoena to attend before the grand jury, and give material testimony, without knowing that his own conduct was under investigation. The court did not indicate whether or not the defendant had been previously charged at the time of his testimony.

In *United States v. Scully,* 119 F. Supp. 225, 227 (S.D. N.Y. 1954), Judge Medina, speaking for the Second Circuit, attempted to eliminate some of the confusion which has grown from the witness-defendant distinction. In that case, a witness was compelled to testify before a federal grand jury and was later indicted by the same grand jury. The defendant then moved to quash the indictment on the ground that he had been "subpoenaed to testify before the Grand Jury, that he did so testify, and that although the 'auhorities had already marked the defendant for prosecution, intended to indict him and were engaged in bringing his indictment about,' he was nevertheless not 'advised of his constitutional right against self-incrimination.'" Judge Medina indicated that the marked witness concept is based on a false analogy between a grand jury proceeding and trial. The

right not to testify at trial was really the result of a statutory effort to remove the defendant's incapacity to testify in his own defense in a criminal case which existed under the common law. When the defendant was made competent to testify in his own behalf, the statutes preserved the defendant's right to remain silent without prejudice, as provided in the Fifth Amendment. This led to the further rule that the defendant may not be called as a witness by the prosecution since to force him to exercise his option in open court would in all likelihood prejudice the jury beyond all possibility of repair. Some courts then analogized that since the defendant could not be called to testify at trial, he should not be called to testify before a grand jury unless he is willing to be a witness and waives his right to give self-incriminating testimony. Those cases conclude that there can be no effective waiver unless the defendant is properly informed of his rights and understands what he is doing. Judge Medina disagrees with this analogy and in so doing states as follows:

> "These considerations do not apply to the inquisitorial proceedings of a Grand Jury. Such a body is not charged with the duty of deciding innocence or guilt and, for this reason, its proceedings have never been conducted with the assiduous regard for the presentation of procedural safeguards which normally attends the ultimate trial of the issues. Thus, in such proceedings, there is no right to counsel, no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal and ordinarily no

> requirement that the evidence introduced be only such as would be admissible upon a trial."

He qualifies his statement as dictum, however, since Scully had not in fact been charged when he testified before the grand jury and was therefore not a "defendant." The Second Circuit did hold as follows, however:

> "And so we now hold that the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury."

In the instant case, Brady appeared before the grand jury as a witness; that is to say, at the time of his appearance he was not under indictment nor was he charged by information or by complaint. It is true, however, that he had previously been charged by complaint earlier in the year and although this matter was dismissed by the magistrate at preliminary examination, the circumstances gave rise to widespread publicity. This incident was probably one of the reasons the grand jury was called (R. 61-62). At the hearing before Judge Ruggeri on May 11, 1966, the district attorney admitted that Brady was one of the persons "that the State was shooting at in this case. He was the cynosure of neighboring eyes, so to speak" (R. 62).

Although the grand jury, as it exists in this state, is primarily an inquisitorial body, Brady was certainly suspect at the time he was asked to testify. The record is clear, however, that Brady, after being advised that

counsel could not be present during his testimony, was warned and advised as to his right against self-incrimination (R. 27-29).

In the defendant's order on motion to suppress, he found that the subject of inquiries before the grand jurors at the time Brady testified was whether or not a crime had been committed by Brady. He further found that Brady was in fact indicted for the identical crimes which were under consideration. More important, Judge Ruggeri found "that [Brady] was compelled over his objection and in the absence of counsel, notwithstanding his demand and request therefor, to give evidence against himself as set forth in the indictment herein, . . ." Such a finding could only be justified either by ignoring the transcript of Brady's testimony wherein he was properly advised as to his rights or with the view that the law protected a witness in Brady's position from appearing on any of the following grounds:

1. That he was in fact a defendant and therefore had the right not to appear as a witness by analogy to the rule which prevails at trial (even though Brady wanted to testify).

2. That this was a stage in his criminal prosecution and therefore he was entitled to the aid and assistance of counsel in his defense under both the state and federal Constitutions.

3. That the warning which was given him as

to his right against self-incrimination and his subsequent waiver was ineffective because of his characterization as an accused, since he was not afforded the aid and assistance of counsel (by extension of the Supreme Court's rulings in *Escobedo* and *Miranda infra.*)

It is not clear from the defendant's order as to the precise ground he relies upon. The effect of the order, however, is to hold that a witness, though not charged at the time of his appearance, is an accused if the grand jury has reason to suspect him of wrong-doing, and any warning or advice as to his constitutional rights is to no avail unless he is afforded the right to counsel before the grand jury. This, of course, by implication, holds *Utah Code Ann.* §77-19-9 (1953) to be unconstitutional and in fact, holds the grand jury itself to be unconstitutional as the rights and powers of that institution have been defined since approximately the 13th Century until the present time.

In 1957 the Supreme Court of the United States decided *In re Groban's Petition,* 352 U.S. 330 (1957) (Black, Douglas, and Brennan, JJ., and Warren, CJ., dissenting). That case involved a proceeding for a writ of habeas corpus by a witness who had been committed to jail because of his refusal to testify before a fire marshal in a private investigation without the right of counsel. The Court indicated that it was clear that a defendant in a state criminal trial had an unqualified right under the due process clause to be represented by

counsel. The Court held, however, that the proceeding before the fire marshal was not a criminal trial nor was it an administrative proceeding that would "in any way adjudicate appellants' responsibilities for the fire." The court further stated as follows:

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. *A witness before a grand jury, cannot insist, as a matter of constitutional right, upon being represented by his counsel,* nor can a witness before other investigatory bodies." (Emphasis added.)

In this regard the court cited with approval *In re Black,* 47 F.2d 542, (2d Cir. 1931) and *United States v. Blanton,* 77 F. Supp. 812 (D. Mo. 1948). The Court also cites with approval Judge Medina's opinion in *United States v. Scully,* 225 F.2d 113 (2d Cir. 1955); *cert. den.* 350 U.S. 897.

Justice Black's dissent in the *Groban* case is significant, since he does not disagree with the dictim of the majority concerning the rights of a witness before a grand jury. Justice Black, with whom Chief Justice Warren and Justices Douglas and Brennan joined, stated as follows:

> "To support its decision that Ohio can punish

a witness for refusing to submit to the Fire Marshal's secret interrogation, the majority places heavy reliance on the practice of examining witnesses before a grand jury in secret without the presence of the witness' counsel. But any surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed.

"They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

The record in the instant case evidences some concern over the recent opinions of the Supreme Court concerning the rights of persons in police custody; however, in his brief the defendant does not place any specific weight on *Escobedo v. State of Illinois,* 378 U.S. 478 (1964) Harlan, Stewart, White and Clark, J.J., dissenting) or *Miranda v. Arizona,* 384 U.S. 436 (1966) (Clark,

Harlan, Stewart and White, J.J., dissenting). The Supreme Court held that the statements elicited from the defendant by the police at the stationhouse could not be used against him at trial since at the time the statements were made the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on Escobedo. The defendant had been denied an opportunity to consult with his lawyer and the police had not effectively warned him of his absolute constitutional right to remain silent. In *Miranda,* Chief Justice Warren, speaking for the Court, attempted "to give concrete constitutional guidelines for law enforcement agencies and courts to follow" in connection with the application of the privilege against self-incrimination to "in-custody interrogation." It is submitted that *Escobedo* and *Miranda* are aimed primarily at providing proper guidelines for police interrogation. See Wright, *The New Rule of Defense Counsel Under Escobedo,* 52 A.B.A.J. 1117 (Dec. 1966). They do not purport to modify the long line of decisions which define the rights of a witness before a grand jury, nor do they in any way infringe upon the grand jury's right to conduct secret proceedings. It is true that Justice White in his dissent in *Escobedo* states as follows:

> "The Fifth Amendment permits upon probable cause even compulsory searches of the suspect and his possessions and the use of the fruits of the search at trial, all in the absence of counsel. The Fifth Amendment and state constitutional provisions authorize, indeed require, inquisitorial grand jury proceedings at which a potential de-

> fendant, in the absence of counsel, is shielded against no more than compulsory incrimination. *Mulloney v. United States*, 79 F.2d 566, 578, (C.A. 1st Cir.); *United States v. Benjamin*, 120 F.2d 521, 522 (C.A. 2d Cir.); *United States v. Scully*, 225 F.2d 113, 115 (C.A. 2d Cir.); *United States v. Gilboy*, 160 F. Supp. 442 (D.C. M.D. Pa.). A grand jury witness, who may be a suspect, in interrogated and his answers, at least until today, are admissible in evidence at trial. And these provisions have been thought of as constitutional safeguards to persons suspected of an offense."

It is submitted, however, that the Supreme Court's opinion may not be so far reaching as to change the settled procedure of the grand jury and invalidate statutes such as *Utah Code Ann.* §77-19-9 (1953). The safeguards found in grand jury procedures as recognized by Justice Black in his dissent in the *Groban* case may still be valid. It is submitted that the Supreme Court could find a valid distinction between the interrogations of *Escobedo* and *Miranda* and the proceedings of the Salt Lake County Grand Jury. In this regard, one should note that the Court in *Miranda* does not find a right to counsel in those circumstances under the Sixth Amendment, but rather requires counsel in order to secure a valid understanding and waiver of the right against self-incrimination under the Fifth Amendment.

The defendant in his brief places great reliance on *State v. Byington*, 114 Utah 388, 200 P.2d 723 (1948). That case has little similarity to the instant case. In *State v. Byington* the defendant was compelled to testify

in a civil matter before the court and was not warned of his right against self-incrimination. The defendant in that case made misstatements of fact in lieu of answers which would have incriminated him. He was subsequently charged with perjury. The Supreme Court of Utah held that the privilege against self-incrimination protected a witness as well as a party in a civil as well as a criminal matter. It further held that the defendant's allegedly perjurious answers could not be used against him in a subsequent criminal trial, since he was not properly advised as to his constitutional rights and the only way he knew how to protect himself was to lie. This was his layman's way of invoking the privilege.

The Sixth Amendment to the Constitution of the United States and Article I, Section 12, of the Constitution of Utah, grants to a person the right to have the assistance of counsel in criminal prosecution. In considering the views (facts) set forth which may aid this court in understanding the law which would not support the decision of Judge Ruggeri a fair conclusion would be that these provisions are not in conflict with nor do they in any manner modify the equally important constitutional provisions which call for the creation of grand juries and likewise, in no way limit or modify the powers or procedures which have been carefully, through centuries of human history, judicial opinion and statutory law.

Brady was not a defendant in the sense that there was an outstanding criminal charge on file against him

at the time of his testimony and it may reasonably be argued that even though he was a subject of inquiry, he, without the aid of counsel, was not precluded from being called as a witness before the grand jury to testify concerning his activities. To conclude accordingly would necessitate a determination that the grand jury is not a court and that proceedings before such a body would not constitute a criminal prosecution, nor a custodial type of appearance where a witness though being able to invoke his privilege against self-incrimination is not entitled to the other benefits afforded by the law under the theory of *In Re Groban,* supra.

Having reviewed the history and purposes of grand juries from the extensive case law which has given an insight into the historical background and modern understanding of trends, it seems appropriate to point out the controversial views as well as the possible impact of supreme court decisions rendered in the last several years. First, however, in analyzing this problem from the standpoint of Judge Ruggeri's decision being correct, it might be wise to recall certain constitutional rights and statutory privileges pertaining to criminal procedure.

The wording of Section I of the Fourteenth Amendment of the Constitution of the United States, pertaining to equal protection by law; Article I, Section 12, of the Constitution of Utah, protection of the accused from any evidence against himself, codified at 77-1-10, Utah Code Annotated 1953 need not be repeated. A difference

in Federal Practice and Utah law is noted in *Orfield, Criminal Procedure Under Federal Rules*, Section 6:99, wherein the author notes in discussing Rule 6:

> "Various Federal immunity statutes protect persons testifying before the Grand Jury so that they may secure dismissal of indictments against them. Where a witness before the Grand Jury has been granted full immunity and the United States Attorney with the approval of the Attorney General has applied for an order directing the witness to testify, if the defendant disobeys the order, he is guilty of contempt."

Utah has no general granting of immunity laws, In re *Contempt of Neuman C. Petty,* No. 10690,, ... U.2d ....., and has only a handful of specific instances where a defendant may be granted immunity from prosecution and thereafter compelled to testify, i.e. violation of Liquor Control Act. There exists no means for a prosecutor or Court to afford a witness immunity from prosecution for possible incriminating testimony in the case in question.

The indictment obligation of our grand juries, so far as is pertinent to the instant case, states:

> The Grand Jury ought to find an indictment when all of the evidence before them, taken together, if unexplained, or uncontradicted, would, in their judgment, warrant a conviction by a trial jury." 77-19-5, Utah Code Annotated 1953.

The jury has the power of subpoena (Section 77-49-

12, Utah Code Annotated 1953) to compel the presence of witnesses, which are defined as follows:

> " 'Witness' shall include a person whose testimony is desired in any proceeding or investigation by a grand jury, or in a criminal action, prosecution or proceeding."

Section 77-45-11, Utah Code Annotated 1953.
And further, the jury may cite a person for contempt for dishonoring a subpoena (Section 77-45-8, Utah Code Annotated 1953).

In correlating the position of Brady as a person under investigation, we know in Section 77-44-5 that:

> "If a *defendant offers* himself as a witness, he may be cross examined by the counsel for the State the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him or be used against him on the trial or proceeding." (Emphasis ours.)

By oath, juries are obligated to inquire into and

> ". . . true presentment make of all public offenses against the laws of this state, committed or triable within this county. . ."

Section 77-18-4, Utah Code Annotated 1953.

It could be reasoned that with their power to subpoena witnesses, report proceedings before them for use in trials of indicted persons, their obligation to weigh and deliberate on the evidence, in effect, find probable

cause that a crime has been committed and that the indicted committed the same, a grand jury, in essence sits in the capacity of a committing magistrate.

The State of New York has for many years dismissed indictments where the defendant gave evidence against himself during the course of grand jury proceedings. Its Constitution, Article I, Section 12, contains similar provisions to the Utah State Constitution and reads, so far as it is pertinent here:

> ". . . and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation, and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself. . . ."

In *People v. Thomasello,* 264 NY Supp. 2d 66, 1965, the defendant had been named in an indictment charging first degree perjury before a grand jury, wherein he was also indicted for conspiracy to violate other certain penal statutes. In relying upon *People v. DeFeo,* 131 NY Supp. 2d 806; and *People v. Lano,* 218 NY Supp. 2d 647, the New York Court stated:

> "Until the enactment in 1953 of Section 2447 of the Penal Law, L. 1953, ch. 981 (generally similar to the immunity provisions of Rule 6, Federal Rules of Civil Procedure) it was clear that one who was required to testify before a grand jury

concerning the acts of others and in the process incriminates himself, has not had his privilege violated unless he first asserts it, and it is overruled. On the other hand, if the witness was examined concerning his own acts looking to a criminal prosecution against him for those acts, his privilege was violated, even though he failed to assert or claim his privilege. (Citing *People v. Gillette*, 111 NY Supp. 131, and other cases.)

"The effect of the violation of the privilege was that the witness' testimony might not be used to ground an indictment for the substantive crime of which he was accused nor might he be prosecuted for any contempt or perjury arising from the testimony elicted in violation of witness' constitutional privilege." (Citing *People v. Gillette*, supra)

"He did not thereby gain an immunity from prosecution for a substantive crime if an indictment was thereafter obtained on proper and competent testimony. (*Gillette*, supra)

Again, on page 812:

"The district attorney claims that DeFeo was not a prospective defendant. 'We cannot agree. He asserts that it is apparent that DeFeo was being questioned in order to obtain evidence against his associate and against those who accepted rebates and bribes.' He asserts further that any doubt as to DeFeo's status as a witness is removed by the conferring of immunity on the witness pursuant to Section 24,-47 of the Penal Law, which purportedly occurred on the fourth day of the testimony. Whether DeFeo was a prospective defendant is not to be determined by a

> subjective examination in the mind of the prosecutor. The scope of the inquiry made DeFeo a possible defendant. The questions addressed to him related to acts of his, denominated criminal, under the Criminal Law. For the purpose of applying the constitutional privilege DeFeo was a prospective defendant. This is not a situation where it is not clear who are the alleged wrongdoers, or who are those who know the facts. In such a case the prosecutor may not know who are the prospective defendants. In this instance, the record is clear, DeFeo was the target even if perchance he was not to be the bull's eye."

In the *Laino* case, supra, the defendant was required to appear with his books and records to give testimony concerning certain public corruption involving the purchase of tires by the City of Utica. He was specifically informed that he was merey a witness; that he was not a defendant, but that tire purchases from his business enterprise by the city was under investigation. Although not being indicted for any crime pertaining to official corruption, Laino was indicted for state income tax evasion, and at page 655, Court states:

> "As a prospective defendant, then, this defendant, together with his books and records, was subpoenaed before the Investigation and the Grand Jury, and examined in relation to his own conduct. In such a case the subpoena is deemed to be a form of compulsion, and the testimony thus compelled may not be used against defendant as a basis of an indictment, or for any other purpose. This interpretation of our State's constitutional

privilege against self incrimination is well established and is no longer open to question."

Since the term "criminal prosecution" may reasonably be considered as a turning point of whether or not a person is entitled to the aid of counsel, an investigation into what that term means seems appropriate.

Utah has appeared to conform with the earlier general American rules on the various types of instances which might be termed a criminal prosecution. Traditionally, as one would derive from the cases noted in *Words and Phrases,* Habeas Corpus, violations of city ordinances, inquiries before grand juries, proceedings in juvenile court, probation violations and preliminary hearings in felony cases, each, at one time or another, have been held not to constitute such, so as to entitle defendant to aid of counsel. Prior to the adoption by the State of Utah of the Uniform Criminal Extradition Act in substance thirty years ago, it is a question whether the weight of authority would have classified those proceedings as a "criminal prosecution" wherein defendant was entitled to counsel. A possible current trend deviates from these earlier cases, as evidenced by the following illustrations: *McDonald v. Moore,* 353 F2d 263; *Harvey v. Mississippi,* 340 F2d 263; (constitutional right to counsel in misdemeanor cases); *LeFaver v. Turner,* 231 F. Supp. 895; (right to counsel on habeas corpus proceedings); *Kent v. U. S.,* 16 LE2d 84; *Ex Parte State Ex Rel Echols,* 17 So2d 449; *U. S. v. Hoston,* 353 F2d 723; *En Re Contreras,* 241 P2d 631; *Black v. U. S.,* 355 F2d

104; (pertaining to juveniles' rights to counsel in various types of juvenile proceedings); *Williams v. Commonwealth,* 216 NE2d 779; (right to counsel at parole and revocation hearings); *People v. Breeze,* 213 NE2d 500; (right to counsel in sanity commitment proceedings); *En Re Johnson,* 398 P2d 420; (right to counsel in traffic offenses).

The U. S. Court of Appeals, 2nd Circuit, 1965, *U. S. v. Winter,* 348 F2d 204, may tend to acknowledge these trends when it stated, at page 207, after noting adherence to the long precident of that circuit which runs in direct conflict to the "target of investigation" of New York rule and sustaining the lower court because Winter had expected a waiver of immunity:

> "Whether or not recent constitutional developments have drawn into question particular language or authority cited in these decisions their basic force remains unimpaired." (Citing the cases found on page 31 of plaintiff's brief.)

One might argue that the Court of Appeals upholds the Winters conviction solely upon precident in that circuit and without the aid of the rule invoked upon all courts by *Miranda v. Arizona,* supra, and accordingly understand its apparent quandry in making the above quoted statement.

In *U. S. v. Pappadio,* 346 F2d 5, 8, the Court noted in sustaining defendant's conviction of contempt of court for failing to answer questions put to him after a grant

of immunity in accordance with Federal Rule of Criminal Procedure 6, that had the questions propounded to defendant been pertinent to the pending indictment against him, the defendant would either be entitled to dismissal of that indictment or an Order protecting him from the use of those answers in that trial.

Connecticut, on the other hand, has a unique grand jury system, as is noted in the case of *State v. Stallings*, 206 At 2d 277, which requires an indictment in all cases where the possible punishment is death or life imprisonment. In that grand jury proceeding:

> ". . . the accused is neither interrogated, put to plea, nor permitted to present a defense. . . ."

In the September-October issue of Trial, a publication of the American Trial Lawyers Association, at page 8, is a discussion of recent legislation proposed by former governor Forrester Furcolo. This legislation proposes:

> "The abolition of a Special Grand Jury as a politically -motivated body; more use of 'show cause' hearings by a judge for commencement of criminal proceedings; and the inauguration of a monitor system, or the right of counsel within the Grand Jury."

The general principles historically discussed heretofore in this brief concerning self-incrimination from its inception in England, and the subsequent abolition of the Star Chamber and the Court of High Commission in 1641, are discussed in 15 Buffalo Law Review 595, *The*

Prospective Defendant Rule and the Privilege Against Self-Incrimination by Dirzon and Gerard (1965); at page 600, the authors write:

> "In contrast to investigations performed by police, the Grand Jury proceeding is a secret, *ex parte* inquisition wherein a prosecutor is always present, and actively participates in and to a large extent controls proceedings. Defendants or witnesses are not permitted to be accompanied by counsel in the Grand Jury chambers. As if to compensate for the unilateral nature of this stage of the action, a more exquisite degree of judicial sensitivity with respect to the right to be freed from testimonial compulsion is evidenced by the operation of the strict exclusionary rule. The rule is applied when a witness has been compelled to incriminae himself by the use of judicial process in violation of his privilege against self-incrimination. Where a Grand Jury investigation is aimed against a particular individual in such a way that it becomes apparent that the main objective is to extract incriminating evidencefrom his own lips, the court considers that he stands in the same position as a defendant at his own trial. The effect of the violation of the witnesses' privilege is the judicial exclusion of any testimony so compelled and a dismissal of any ensuing indictment based upon such testimony. Stated simply this is the prospective defendant rule operative in connection with the Grand Jury Investigatory process. In contrast with the law enforcement inquiry, the witness may have fully availed himself to his right to consult with counsel prior to his appearance before the Grand Jury, he may have been advised in advance of the proceeding of his privilege to respond to any questions if the

> answers tend to incriminate him and indeed he may testify without ever interposing his privilege. Nevertheless the courts will disallow any incriminating testimony elicted from him in any subsequent prosecution resulting from the investigation. With the application of the prospective defendant rule in the Grand Jury phase, judicial reaction against testimonial compulsion is conspicuously more intense than at the law enforcement level. Here the touchstone to judicial sensitivity is the concept of legal compulsion, externalized in the subpoena."

In differentiating between statutory and constitutional immunity, the article states:

> "The crucial distinction between statutory immunity and the Constitutional exclusionary rule is that the former specifically accepts non-substantive crimes such as perjury and bribery which may be committed by the immunized witness during the investigation, from its protective cloak. However, in the case of the witness whose constitutional privilege has been violated because of his sanctifying status as a prospective defendant, he is protected from any indictment for either contempt or perjury, as well as any substantive crime, if such indictment is based in any manner upon the testimony compelled from him."

A definition of prospective defendant through various tests together with the conclusion of the authors commences at page 609:

> "He is simply anyone who has not executed a waiver of immunity and who has testified under oath before a Grand Jury pursuant to subpoena

> without immunity and against whom an indictment for a crime other than perjury and criminal contempt has been returned. But if the witness' exemption is accomplished as a result of a presumption that he was all the time in fact a prospective defendant, there is no sound reason for denying to him an exemptive status for perjurious testimony or contemptuous conduct which may have preceded the return of the indictment for the substantive crime."

And further at 609 and 610:

> "As a necessary corollary to the protections embraced by the privilege against self-incrimination, the exclusionary rule was clearly designed to operate as a bulwark against oppressive, inquisitional techniques designed to extract declarations of guilt from those accused or suspected of crime. It is containment of prosecutorial and investigatorial abuse of the immense power to compel testimony through the issuance of compulsory judicial process that is the essential ambition of the rule. There is little justification for declaring as abusive those efforts by an investigatory body to obtain valuable information from persons who cannot reasonably be cast as suspected or accused persons at the time of the exertion of the compulsion." (The foregoing is an excerpt from "The Consequence Test" in attempting to ascertain who is a prospective defendant.)

In defining another possible test the Review Article entitles the same, The Prosecutorial Construction Knowledge Test:

> "There are certain observable factors by

which the prosecutor's knowledge of the witness' status may be objectively ascertained. The scope of the inquiry may render a witness a possible defendant and the closer the witness' calling is identified with the scope of the inquiry, the more compelling his status as a prospective defendant will become. Once a reasonable nexus between the witness and scope of the inquiry is established, a disclosure in the minutes of the Grand Jury that the examination related to the witness' own conduct and affairs will almost invariably result in the finding that the prosecutor 'must have known in advance' that the witness was in fact a prospective defendant."

By way of conclusion, the article stated at page 613:

"It is difficult to escape the fact that the very act on the part of the prosecutor in calling a witness reflects a pre-supposition that the witness is possessed of some knowledge or information of the subject of inquiry. This alone would seem sufficient to place the individual close enough to the subject of the investigation so as to justify his classification as a possible defendant or at least one in the target. By creating this classification of protected persons, whose boundary is today as diaphanous as it was once was rigid, the courts have stricken the balance between the individual rights and the investigatorial necessity in favor of the former. It is submitted that the result is sound. By calling one who is judicially determined to be a prospective defendant, at most the prosecutor is allowed a single fish to elude the net, and if testimony is adduced he has received the benefit of information which may be successful in successfully prosecuting others. It is the

occasion when the witness refuses to testify without asserting their privilege against self-incrimination, thus preventing the operation of the immunity statute, and are later held to be exempt from contempt action because of the prospective defendant status that the prosecutor has lost both the fish and the net."

And further:

> "With the knowledge that the innermost secrets of his investigation will be exposed to the searing light of the defendant's scrutiny, it is likely that the issuance of every subpoena will be reviewed with the greatest care — thus preserving the integrity of the investigation and at the same time avoiding the violation of precious constitutional right." (Page 14, supra)

In Meshbesher, *Right to Counsel Before Grand Jury*, Twentieth Annual Convention, American Trial Lawyers Association, July 24, 1966, the author notes:

> "Whatever the bridge Escobedo and Miranda built between police interrogation and the privilege against self-incrimination, no such bridge is needed to apply the privilege to grand jury proceedings. As made plain at the outset, it is well settled that the witness before the grand jury can claim the privilege, for such a witness can be legally compelled to answer and can be held in contempt for refusal to do so. Whatever the requisite length, intensity and 'coerciveness' of police interrogation before it can be said that the suspect is being 'compelled' to answer, as a practical matter, no comparable significance attaches to the kind of questioning conducted in

> the grand jury room. No conceptual gap between the grand jury proceedings and the privilege exists to be filled. In the grand jury room it is unnecessary to consider whether misleading, unfair, abusive or coercive questioning under 'color of law' have produced *de facto* conditions equivalent to legal compulsion to answer, for in the grand jury room a person *is* under *legal* compulsion to answer; there is a legal obligation to which the privilege in the technical sense can and does apply."

In closing it seems appropriate to call this Court's attention to two decisions of the United States Supreme Court on January 16, 1967, striking down restrictions imposed by statute or by administrative bodies against a person's right to take the Fifth Amendment. Edward Garrity, et al, found New Jersey police officers being compelled to testify in a state investigation concerning alleged unlawful activities as police officers, and Samuel Speveck, a New York lawyer, was disbarred for invoking the Fifth Amendment concerning his dealings with his clients. In the Garrity case, the coerced confessions were thrown out and Speveck was reinstated.

CONCLUSION

Criminal Law Section, in preparing this advisory brief, has attempted to do so without recommendation as to conclusion and without taking any position either for or against the decision of the Honorable Henry Ruggeri. We have set out, as completely and as lucidly as possible, later cases from various jurisdictions for the

benefit of the court and feel that they adequately explain the trend of law in matters of this type.

Respectfully submitted,

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